IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.1220 OF 2004

AND

NOTICE OF MOTION NO.1425 OF 2004

IN

SUIT NO.1210 OF 2004

...

Mauser Werke GmbH
and another. ...Plaintiffs

v/s.

M/s.BSA Polycontainers and
another ...Defendants

...

Mr.Janak Dwarkadas with Mr.Rahul Chitnis i/b Mrs.Yashoda Bhat for the Plaintiffs.

Mr.H.W.Kane with Mr.Rahul Kadam for the Defendants.

...

CORAM: D.K.DESHMUKH, J.

DATED: 15TH MARCH,2005

P.C.:

1. Notice of Motion No.1220 of 2004 has been taken out by the Plaintiffs and Notice of Motion No.1425 of 2004 has been taken out by the Defendants Nos. 1 & 2.

2. The facts that are material and relevant for deciding these Notices of Motion are that

(i) the Plaintiffs have filed the present suit, inter

alia, praying for a permanent injunction restraining the Defendants from infringing the Plaintiff No.1's patents (Indian Patent Nos. 179257 and 179292) in any manner and applying its Registered Designs (Registration No.162573 and 164729) and/or fraudulent or obvious imitation thereof and for damages and/or for accounts of profits and delivery for destruction of infringed/pirated goods etc.

(ii). The case of the Plaintiffs is that Patent No.179257 relates to the stacking performance of the barrels/drums to improve the stacking properties. The novelty of the invention lies to allow the upper barrel head and lower barrel head to deform elastically and build up internal hydrostatic pressure to resist the top load before transmitting the part of the load to the outer cylindrical wall and through the handling rings, saving them from any appreciable deformation/buckling. Amongst other things, this is achieved by connecting the end surfaces of the drum which bears the load to the drum body wall through resiliently deformable annular portions which are conical in cross section.

(iii) Plaintiffs state that the Patent No.179292

relates to the optimal drainability of the drum. When the filled-in (liquid) goods in emptied out of the drum by keeping the drum in inverted/tilted position, the novelty feature of this patent allows the optimal/complete emptying of the residue from the drum without the need to rock the drum to and fro. This invention is achieved by scientifically providing an inclination/slant on the top portion of the drum without compromising drop or stack performance.

(iv) The barrels/drums which are being manufactured by the Plaintiffs are by applying the Plaintiff No.1's parent (Indian Patent Nos. 179257 and 179292) and applying its Registered Designs (registration No.162573 and 164729) are hereinafter referred to as 'A type' barrels/drums.

(v) The Defendants Nos. 1 and 2 are manufacturers of plastic drums, who are manufacturing and selling the infringing drums. Defendants Nos. 3 and 4 are the mould makers, who have made the moulds used in the manufacture of the infringing drums. The moulds manufactured by Defendant Nos. 3 & 4 can be used only for the purpose of making the infringing drums

and for no other purpose whatsoever. The Plaintiffs state that by making the moulds the Defendants Nos. 3 & 4 have aided and abetted Defendant Nos. 1 & 2 in infringing the patents of Plaintiff No.1.

(vi) By order dated 22nd April, 2004 this Court granted ad-interim order in terms of prayer clauses (a), (b), (c) and (d) of Notice of Motion No.1220 of 2004. The Receiver was appointed of all products/articles manufactured by the Defendants by infringing the Patent Nos. 179257 and 179292 and the Design Nos. 162573 and all products/articles by using the same patents and by applying the said designs and/or molds and any other material implement, the predominant use of which is the creation of infringing the said patent and to take physical possession of all the drums/barrels manufactured by the Defendants Nos. 1 & 2 by infringing the patents Nos. 179257 and 179292 and the designs Nos.162573 and all drums/barrels by using the said patents and by applying the said designs and all moulds and any other material and implement, the predominant use of which is in the creation of infringing the said patents and the said designs which are in possession of the Defendants Nos. 1 and

2.

(vii) On or about 27th April, 2004, the representative of the Court Receiver, High Court, Bombay attended the factory of Defendants Nos. 1 and 2 situated at Plot Nos. 86 and 87B, Nanji Industrial Estate, Village Kharadpada, Silvassa for taking physical possession of all the drums/barrels manufactured by the Defendants Nos. 1 and 2 by infringing the patents Nos. 179257 and 179292 and the designs Nos. 162573 and all drums/barrels by using the said patents and by applying the said designs and all moulds and any other material and implement, the predominant use of which is in the creation of infringing the said patents and the said designs which are in possession of the Defendants Nos. 1 and 2. The Court Receiver took possession of the following goods from the Defendants Nos. 1 and 2; (a) Blow-Pin (210 litres) (4 pieces), (b) After Coolers (4 pieces), (c) Light Testing Equipment (One piece), (d) die Core (210 litres) (One Piece), (e) Slides (210 litres) (One set), (f) Body Pressure (210 litres) and (g) Drums (113 Pieces) (20 used and 93 unused). However, the representative of the Court Receiver could not take possession of the moulds used

in the manufacture of barrels/drums of 210 litres, as the said moulds were allegedly sent for repairs.

(viii) On or about 27th April, 2004, the representative of the Court Receiver, High Court attended the factory of Defendants Nos. 3 and 4 situated at Gala Nos. 7 and 14 of Ashok Industrial Estate, LBS Marg, Mulund, Mumbai 400 080, for taking physical possession of all the drums/barrels manufactured by the Defendants Nos. 3 and 4 by infringing the patents Nos. 179257 and 179292 and the designs Nos. 162573 and all drums/barrels by using the said patents and by applying the said designs and all moulds and any other material and implement, the predominant use of which is in the creation of infringing the said patents and the said designs which are in possession of the Defendants Nos. 3 and 4. The representative of the Court Receiver took possession of various infringing moulds and mould body parts from Gala Nos. 7 and 14.

(ix) On or about 10th May, 2004, the Defendants Nos. 1 and 2 took out Notice of Motion No.1425 of 2004, praying that the order dated 22nd April, 2004 be

vacated.

(x) Vide order dated 21st May, 2004, the court modified the order dated 22nd April, 2004. The Court continued the ad-interim order granted in terms of prayer clauses (a) and (b) of Notice of Motion No.1220 of 2004, however, cancelled the order appointing the court receiver as against the Defendants Nos. 1 & 2.

(xi) The Plaintiffs filed an appeal against the order dated 21st May, 2004 passed by the learned Single Judge. Pursuant to the order passed by the Appeal Court, the Defendants Nos. 1 & 2 filed an undertaking to the following effect.

> (2) I undertake on behalf of Respondents Nos. 1 and 2 to abide by prayer clause (a) of Notice of Motion No.1220 of 2004 till further orders of this Hon'ble Court.
>
> (3) I undertake that the articles in item Nos. 1 to 7 at page 3 of the Court Receiver's Report dated 6th May, 2004 namely (a) Blow-Pin (210 litres) (4

pieces), (b) After Coolers (4 pieces), (c) Light Testing Equipment (One piece), (d) Die Core (210 litres) (One Piece), (e) Slides (210 litres) (One Set), (f) Body Pressure (210 litres) and (g) Drums (113 Pieces) (20 used and 93 unused) will be retained by me at my factory premises at plot No.86 and 87 B, nanji Industrial Estate, Village Kharadapada, Silvassa 396235 pending further orders from this Hon'ble Court.

(4) I say that after the mould is repaired and returned to me, I will retain the same at the above premises pending further orders from this Hon'ble Court.

(xii) The Defendants Nos. 1 and 2 have filed an Affidavit dated 12th January, 2005 stating that they have now discontinued the activity of manufacturing and selling the barrels/drums complained of, by the Plaintiffs and they do not desire to manufacture and sell the impugned drums till disposal of the suit. The Defendants Nos. 1 and 2 also stated that they were now manufacturing and selling the drums which

did not contain all the essential integers and/or design of the Plaintiffs' patented barrels/drums. The Defendants Nos. 1 and 2 also agreed not to manufacture and/or sell the impugned drums and stated that there was no cause or ground for the Plaintiffs to seek injunction or other reliefs in the Notice of Motion.

(xiii) When the arguments commenced on Notice of Motion No.1220 of 2004, Defendants Nos. 1 and 2 conceded that they had no objection if the ad-interim reliefs in terms of prayers (a) and (b) of the said Notice of Motion were confirmed pending disposal of the suit.

3. In the written submission filed on behalf of the Defendants Nos. 1 & 2, the Defendants Nos. 1 & 2 stated that the Defendants have through their Counsel agreed to hand over to the Court Receiver, the 'top' and 'bottom' part of one mould of the impugned drum complained of in the plaint in their possession. The Defendants have also agreed that out of 113 drums seized by the Court Receiver, 2 drums may be retained by the Court Receiver and the Defendants may be allowed to break the remaining

drums into small pieces in the presence of the Court Receiver and the broken pieces may be returned to the Defendants for recycling the material.

4. Defendants Nos. 1 & 2 have also asked for unsealing of certain items seized by the Court Receiver to be returned to the Defendants.

5. In view of the concession made on behalf of the Defendants Nos. 1 & 2, firstly, Notice of Motion No.1425 of 2004 is disposed of, as no order is necessary in that Notice of Motion.

6. So far as Notice of Motion No.1220 of 2004 is concerned, it is granted in terms of prayers (a) and (b) against the Defendants Nos. 1 & 2. As per their statement, the Defendants Nos. 1 & 2 shall hand over to the Court Receiver the 'top' and 'bottom' part of one mould of the impugned drum complained of in the plaint in their possession. Defendants Nos. 1 & 2 shall also destroy 113 drums seized by the Court Receiver in the presence of the Court Receiver, as per their statement. The Court Receiver, however, shall retain two of the drums. The Court Receiver is directed to return to the

Defendants Nos. 1 & 2 items Nos. 1 to 6 at page 3 of the Court Receiver's report, which were seized by the Court Receiver from the Defendants Nos. 1 & 2.

7. So far as Defendants Nos. 3 & 4 are concerned, according to the Plaintiffs, Defendants Nos. 3 and 4 have dishonestly and for personal gain, prepared the moulds for Defendants Nos. 1 and 2 to manufacture its barrels/ drums by using the Plaintiff No.1's patents (Indian Patent Nos.179257 and 179292) and also applied its Registered Designs (Registration No.162573 and 164729) and related drawings and/or by way of reverse engineering. The Plaintiffs state that Defendants Nos.3 and 4 are aiding and abetting Defendants Nos. 1 and 2 to infringe the said patents and the said designs. Defendants Nos. 3 and 4 are not authorised to make moulds by using the Plaintiff No.1's patents (Indian Patent Nos. 179257 and 179292) applying its Registered Designs (Registration No.162573 and 164729) for anyone else except Plaintiff No.2.

8. The Plaintiffs also stated that Defendant Nos. 3 and 4 are issuing calendars stating that 'Mauser Containers' (the infringing barrels/drums) could be

made using the moulds, which are manufactured by Defendants Nos. 3 and 4. The Defendants Nos. 3 and 4 are thus inviting or procuring customers to acquire the moulds which would enable the manufacturer of the barrels/drums to infringe the Plaintiffs patents and designs.

9. Defendants Nos.3 and 4 have also stated that parties seeking to manufacture moulds or dies of plastic items approach them and show samples or trade literature or brochures or photographs of similar products. Defendants Nos. 3 and 4 then prepare drawings/sketches and/or wooden patterns and after approvals by the parties, manufacture the moulds on the basis of the aforesaid drawings, sketches and/or wooden patterns.

10. With regard to the calendar issued by Defendants Nos. 3 and 4, they have stated that products shown in the calendar are samples of the products produced from the moulds which have been manufactured by Defendants Nos. 3 and 4 for various customers.

11. Defendants Nos. 3 and 4 have stated that goods

mentioned at Serial Nos. 1 to 12 on page 3 of the Report of the Court Receiver, High Court, Bombay are not parts of infringing moulds but are general parts used in making a variety of blow moulds. The goods mentioned at items Nos. 1 to 4 on page 6 of the Report of the Court Receiver, High Court, Bombay belonged to Plaintiff No.2, which had been handed over to Defendant Nos. 3 and 4 for repairs. The goods mentioned at items Nos. 5 and 6 mentioned on page 6 of the Report of the Court Receiver, High Court, Bombay, are parts of moulds which have been manufactured by Defendants Nos. 3 and 4 for Plaintiff No.2. Thus, the Defendants Nos. 3 and 4 stated that the goods seized by the Court Receiver be released to Defendants Nos. 3 and 4 for handing over the same to the Plaintiff No.2 on receipt of due payment.

12. It is Section 48 of the Indian Patents Act, 1970 which confers upon the patentee, where the subject matter of the patent is product, the exclusive right to prevent the third party who did not have his consent, from the act of making, using, offering for sale, selling or importing for these purposes that product in India. Thus, the

registered patent of the Plaintiff has conferred upon the Plaintiffs an exclusive rights to prevent third party from the acts of making,using, offering for sale, selling or importing that product in India. So far as Defendants Nos.3 & 4 are concerned, it is not even the Plaintiffs' case that they have either made sale, offered to sell or imported the products. The case of the Plaintiffs is that the Defendants Nos. 3 & 4 are aiding and abetting the Defendants Nos. 1 & 2 in infringing the rights of the Plaintiffs. In support of this contention the only thing on which the Plaintiffs are relying is the picture of the drums, to be found printed on the calender published by the Defendants Nos. 3 & 4.

13. After having gone through the entire record, I find that by merely printing a picture of some drums, including mauser drums in its calender, it cannot be said that the Defendants Nos. 3 & 4 are aiding and abetting Defendants Nos. 1 & 2 and others in infringing the rights of the Plaintiffs. The manufacture and sale of the moulds by the Defendants Nos.3 and 4 may facilitate others to commit infringement, but it will not, in my opinion,

amount to aiding and abetting others to commit infringement. In my opinion, merely, printing a picture of a Mauser drum on the calender by the Defendants Nos. 3 & 4 will not amount to inducement by them to others to commit infringement. The calender of the Defendants Nos. 3 and 4 is, at the most, advertisement by them that they manufacture moulds for mauser drums. It amounts neither to inducement nor procuring the infringement. It is common ground that the act of manufacturing and selling moulds of the Defendants Nos. 3 & 4 does not amount to infringement, though it facilitates a person to infringe the rights of the Plaintiffs to do so.

14. In this view of the matter, therefore, in my opinion, as the Plaintiffs have failed to establish prima facie that the Defendants Nos. 3 & 4 by merely manufacturing the moulds are aiding and abetting the Defendants Nos. 1 & 2, it cannot be said that the Defendants Nos. 3 & 4 have infringed any of the rights of the Plaintiffs. The Plaintiffs, therefore, are not entitled to any interim relief against the Defendants Nos. 3 & 4. Therefore, any ad-interim order that may be

operating against the Defendants Nos. 3 & 4 is vacated. In so far as the articles which may have been seized by the Court Receiver in relation to Defendants Nos. 3 & 4, the Court Receiver stands discharged. The Court Receiver is directed to return those articles to the Defendants Nos. 3 & 4.

15. Both Notices of Motion are disposed of.

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